INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statutes involved	3
Statement	3
Argument	7
Conclusion	13

CITATIONS

Cases:

Automatic Canteen Co. of America v. *Federal Trade Commission*, 346 U.S. 61	10
Fashion Guild v. *Federal Trade Commission*, 312 U.S. 457	8, 11
Federal Trade Commission v. *Beech-Nut Packing Co.*, 257 U.S. 441	8
Federal Trade Commission v. *Broch & Co.*, 363 U.S. 166	9
Federal Trade Commission v. *Cement Institute*, 333 U.S. 683	7
Federal Trade Commission v. *Keppel, R. F. & Bros., Inc.*, 291 U.S. 304	7
Federal Trade Commission v. *Motion Picture Advertising Service Co.*, 344 U.S. 392	7
Federal Trade Commission v. *Standard Oil Co.*, 355 U.S. 396	12
Federal Trade Commission v. *Winsted Hosiery Co.*, 258 U.S. 483	7
Giant Food, Inc. v. *Federal Trade Commission*, No. 16,507, June 14, 1962, Trade Reg. Rep. (1962 Trade Cas.) ¶ 70,351	7, 11
Grand Union Co. v. *Federal Trade Commission*, 300 F.2d 92	7
Kiefer-Stewart Co. v. *Seagram, Joseph E. & Sons, Inc.*, 340 U.S. 211	11
Times-Picayune v. *United States*, 345 U.S. 594	10

Statutes:

	Page
Clayton Act, 38 Stat. 730, as amended by the Robinson-Patman Act, 49 Stat. 1526, 15 U.S.C. 12, *et seq.*:	
Section 2	3
Section 2(d)	6, 7, 8, 9, 10, 11
Federal Trade Commission Act, 66 Stat. 632, 15 U.S.C. 41, *et seq.*:	
Section 5	3, 4, 6, 7, 8, 10, 12
Section 5(a)(1)	3
Robinson-Patman Act, 49 Stat. 1526, 15 U.S.C. 13, *et seq.*:	
Section 2 (d)	10
Section 2 (f)	9, 10
Section 3	9

Miscellaneous:

Dunn, *Section 2(d) and (e)*, New York State Bar A'ssn. Robinson-Patman Act Symposium 55 (CCH 1946)	10
Feldman & Zorn, *Advertising and Promotional Allowances* (Bureau of National Affairs, 1948), pp. 143-146	10
Rowe, *How to Comply with Section 2(c)-(f)*, N.Y. State Bar Ass'n Antitrust Law Symposium (CCH 1957) 124	10

In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 263

AMERICAN NEWS COMPANY AND THE UNION NEWS COMPANY, PETITIONERS

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals, per Judge Clark, and the dissenting opinion of Judge Moore (Pet. App. 19-37), are reported at 300 F.2d 104. The opinion of the Federal Trade Commission (R. 41a-54a),[1] which is not yet officially reported, is unofficially reported at Trade Reg. Rep. (Transfer Binder 1960-61) ¶29,335. The opinion of the court of appeals in *Grand Union Co. v. Federal Trade Commission* (Pet. App. 41-67), a related case decided the same day, is reported at 300

[1] "R" and "RC" refer to the printed appendixes to the petitioners' and Commission's briefs, respectively, in the court of appeals.

F.2d 92. The reasoning in *Grand Union* was adopted by the court in the instant case (Pet. App. 24-25).

JURISDICTION

The judgment of the court of appeals was entered on April 27, 1962 (Pet. App. 38-40). The petition for a writ of certiorari was filed on July 19, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the nation's largest retail newsstand operator violated Section 5 of the Federal Trade Commission Act when it knowingly induced and received from publishers discriminatory payments which Section 2(d) of the Clayton Act forbids the publishers to make.

2. Whether the inducement and receipt of discriminatory payments are justified if done in defense to illegal price fixing.

3. Whether these practices occurred "in commerce" and are therefore within the jurisdiction of the Federal Trade Commission.

4. Whether there was substantial evidence to support the Commission's finding that petitioners knew, or should have known, that they were receiving preferential treatment.[2]

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[2] Subsidiary questions raised by the petition are whether there need be privity of contract between the supplier and an ultimate buyer to establish the buyer as a "customer" for purposes of Section 2(d) of the Clayton Act (discussed *infra*, p. 11), and whether the Commission's cease and desist order, which the court of appeals limited to the practices found to violate the statute, is unduly burdensome (discussed *infra*, p. 12, n. 12).

STATUTES INVOLVED

Pertinent portions of Section 2 of the Clayton Act, 38 Stat. 730, as amended by the Robinson-Patman Act, 49 Stat. 1526, 15 U.S.C. 13, and of Section 5(a)(1) of the Federal Trade Commission Act, 66 Stat. 632, 15 U.S.C. 45(a)(1), are set forth in the petition (pp. 4-5).

STATEMENT

The petition asks this Court to review a decision upholding the Federal Trade Commission's ruling that the nation's largest retail newsstand operator, which demanded and received from publishers promotional allowances which it knew or should have known were not afforded to competing retailers on proportionately equal terms, thereby engaged in unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act. The Commission's ruling rests on the following findings, determined after a full hearing.

Petitioner Union News Company is wholly owned and controlled by petitioner American News Company (R. 42a-43a). Union is the largest retail newsstand operator in the country (R. 42a). In 1958, it operated 930 newsstands located primarily in airports, railroad and subway stations and hotels. The stands are usually operated on the premises of others, under leases for which there is active competition between Union and other operators (R. 42a, 51a). Union's four nearest competitors operated 57, 35, 16 and 16 stands, respectively (R. 52a). Although Union also operates restaurants and gift, book and tobacco shops, and sells other items in addition to newspapers and magazines at its stands (R. 42a), this proceeding involves only practices

in connection with the display and sales of magazines, comic books and pocket books.[3]

Magazines reach the ultimate consumer through two main routes: (1) directly from the publisher by subscription or (2) through a chain of intermediaries ending with the newsstand. Magazines which are distributed through intermediaries usually go from the publisher to a national distributor who redistributes to a wholesaler who, in turn, distributes to a retailer, such as Union. These arrangements are generally on an exclusive basis: the publisher uses only one national distributor and the distributor grants the wholesaler exclusive rights within defined territories (R. 45a-46a). Neither the national distributor nor the local wholesaler has any control over the prices, terms or conditions of sale to the retailer. These are all determined by the publisher. For this reason, Union's negotiations for promotional allowances (the practices which are the subject of this litigation) were conducted with the publisher or distributor on behalf of the publisher, rather than with the wholesaler from whom Union actually received the magazines (R. 29a-31a, 46a-47a).

Petitioners do not deny that they induced and received payments of substantial sums from publishers.

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[3] The complaint charged a violation of Section 5 in connection with the sale of cigars, as well as periodicals and pocket books (R. 6a). However, the Commission found that, while Union had tried to obtain promotional allowances from cigar manufacturers, the evidence in the record was insufficient to show that the allowances sought were knowingly discriminatory. The Commission therefore limited its findings to the practices relating to publications (R. 53a-54a).

These payments amounted in 1957 to $700,000 and, in 1958, to $890,000 (R. 33a-34a, 48a), an amount equal to almost 17 percent of Union's total sales of magazines.[4] Petitioners made demands upon various publishers for promotional allowances at rates determined, not by the publishers but by petitioners, and petitioners threatened to discontinue handling a publication if its publisher refused to comply (R. 31a-33a, 48a-49a).[5] Not one retailer competing with Union received allowances on proportionately equal terms (R. 50a). In a number of instances, the publishers told petitioners that the allowances demanded by petitioners were higher than those paid petitioners' competitors (R. 34a, 50a; RC 76; RC 63, 207-208; R. 287a).

The Commission found that Union occupies "a position of near dominance in the field" (R. 52a) and that its manner of inducing allowances from publishers "represents a classic example of the misuse of the economic power possessed by large buyers" (R. 48a). It found that petitioners had knowingly induced and received from their publishers discriminatory promotional allowances as consideration for services or facilities furnished by petitioners in connection with the sale of the publishers' magazines. It further found that profit margins from the operation of newsstands are very small and that petitioners' successful induce-

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[4] In 1958, Union's total sales through newsstands were approximately $23,940,000, of which $5,280,000 were for magazine sales (R. 42a).

[5] Examples of the manner in which petitioners induced promotional allowances are given in the opinions of the court of appeals (Pet. App. 22) and of the Commission (R. 48a-49a).

ment of discriminatory payments enhanced their ability to outbid their competitors for the desirable newsstand locations and, if allowed to continue, would lead to "the attainment of a monopoly by [petitioners]" (R. 52a). The Commission concluded that these payments by the publishers were unlawful under Section 2(d) of the Clayton Act, and held that inducement and receipt of such unlawful payments constituted an unfair method of competition in violation of Section 5 of the Federal Trade Commission Act (*ibid.*). In rejecting petitioners' claim that their practices were justified because their purpose was to offset the effects of an alleged price-fixing conspiracy by the publishers (R. 50a-52a), the Commission noted that petitioners "had legal processes available through which they could have challenged the alleged illegal actions of the publishers" and, furthermore, that the impact of petitioners' conduct falls "primarily on innocent third parties * * *" (R. 51a).[6] The Commission accordingly directed the entry of an appropriate cease and desist order (R. 55a).

The court of appeals affirmed the holdings on violation in all respects (Pet. App. 20-32). It modified the order, however, so as to limit its prohibitions to "the specific practices involved in these proceedings" (*id.*,

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[6] The Commission also rejected petitioners' contention (R. 43a-45a) that, because the interstate shipment of magazines are broken up and repacked by the wholesaler before being shipped to Union's outlets, petitioners' practice of soliciting and receiving discriminatory allowances from the publishers are not "in commerce" and therefore not within the Commission's jurisdiction.

30, 38-40). The court rejected petitioners' efforts to modify the order still further (*id.*, 30-31).

ARGUMENT

Here, as in *Grand Union Company* v. *F.T.C.*, 300 F.2d 92 (Pet. App. 41-59), the court of appeals upheld the Federal Trade Commission's ruling that large retailers who coerce their suppliers into violating Section 2(d) of the Clayton Act by granting preferential promotional allowances, are themselves guilty of engaging in unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act. These decisions do not stand alone. The Court of Appeals for the District of Columbia Circuit has recently reached the same conclusion. *Giant Food, Inc.* v. *Federal Trade Commission*, No. 16,507, June 14, 1962, Trade Reg. Rep. (1962 Trade Cas.) ¶ 70,351. Moreover, the decision below follows the decisions of this Court recognizing that "Congress advisedly left the concept [of 'unfair methods of competition'] flexible to be defined with particularity by the myriad of cases from the field of business" (*Federal Trade Commission* v. *Motion Picture Advertising Service Co.*, 344 U.S. 392, 394), thereby enabling the Commission to reach practices which run counter to the public policy declared in the Sherman and Clayton Acts, even if not in terms covered by these statutes. See *Federal Trade Commission* v. *Cement Institute*, 333 U.S. 683, 693-695; *Federal Trade Commission* v. *R. F. Keppel & Bro., Inc.*, 291 U.S. 304, 310-312; *Federal Trade Commission* v. *Winsted Hosiery Co.*, 258 U.S. 483, 492-3; *Federal*

Trade Commission v. *Beech-Nut Packing Co.*, 257 U.S. 441, 453.

As the court below said (Pet. App. 53):

> Nor can we accept the notion that the Commission is here legislating a "new antitrust prohibition." The practice itself is clearly proscribed by §2(d); the novelty is solely in the application of §5 to a buyer's knowing receipt of unlawful payments. The Commission is not upsetting specific Congressional policies; the proceedings did not "circumvent the essential criteria of illegality prescribed by the express prohibitions of the Clayton Act." No economic activity, once lawful, has been suddenly brought within the prohibition of the anti-trust laws. Jurisdiction, perhaps, has been expanded from the technical confines of §2(d), but only fully to realize the basic policy of the Robinson-Patman Act, which was to prevent the abuse of *buying* power.[7]

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[7] Petitioners inaccurately suggest (Pet. 14-15) that the practices of large buyers of securing from their suppliers preferences not generally available have not been previously condemned (see Pet. App. 49-50). Nor is there merit in their claim (Pet. 14-15) that there can be no violation of Section 5 without proof of injury to competition. Their contention is inconsistent with this Court's holdings (*Fashion Guild* v. *Federal Trade Commission*, 312 U.S. 457, 467-468 (group boycott); *Federal Trade Commission* v. *Beech-Nut Packing Co.*, 257 U.S. 441 (price fixing)), and was properly rejected by the court of appeals (Pet. App. 25, 55-56). As the opinion notes, "§ 5 is here utilized to reach an integral part of a violation of § 2(d)," which "defines an offense which is illegal *per se*. *Federal Trade Commission* v. *Simplicity Pattern Co.*, 360 U.S. 55." (Pet. App. 55-56.) In any event, petitioners' practices were found to have lessened competition (R. 34a, 51a-52a).

Petitioners' activities are plainly inconsistent with the purpose of Section 2(d) of the Clayton Act, albeit that subsection does not, in terms, apply to buyers.[8] That provision, together with others, was added in 1936 by the Robinson-Patman Act, 49 Stat. 1526, to "curb and prohibit all devices by which large buyers gained discriminatory preferences over smaller ones by virtue of their greater purchasing power." *Federal Trade Commission* v. *Broch & Co.*, 363 U.S. 166, 168. Indeed, Section 3 of the Robinson-Patman Act[9] makes it a criminal offense for "any person

[8] Section 2(d) of the Clayton Act, as amended, 15 U.S.C. 13(d) provides—

> That it shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment, or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities.

[9] Section 3 of the Robinson-Patman Act, 49 Stat. 1528; 15 U.S.C. 13a, provides in pertinent part:

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, to be a party to, or assist in, any transaction of sale, or contract to sell, which discriminates to his knowledge against competitors of the purchaser, in that, any discount, rebate, allowance, or advertising service charge is granted to the purchaser over and above any discount, rebate, allowance, or advertising service charge available at the time of such transaction to said competitors in respect of a sale of goods of like grade, quality, and quantity
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* * * to be a party to, or assist in any transaction of sale * * * which discriminates to his knowledge against competitors of the purchaser * * *." Furthermore, petitioners' practices may well be covered by Section 2(f), which provides that "[i]t shall be unlawful for any person * * * knowingly to induce or receive a discrimination in price which is prohibited by this section."[10] In the light of these considerations, the court below was plainly correct in rejecting the contention "that the Congressional forbearance from including the receipt of compensatory payments in the sanctions of Sections 2(d) and 2(f) * * * was intentional" (Pet. 12). There are no good reasons for supposing that Congress meant to condone the discriminatory practice if initiated by the buyer rather than the seller.[11] In either case, the policy, if not the

[10] The question was left open in *Automatic Canteen Co. of America* v. *Federal Trade Commission*, 346 U.S. 61, 73, n. 14. Many commentators have expressed the view that it does cover such practices. See Dunn, *Section 2(d) and (e)*, New York State Bar Ass'n. Robinson-Patman Act Symposium 55, 56, 61 (CCH 1946); Rowe, *How to Comply with Section 2(c)(f)*, N.Y. State Bar Ass'n Antitrust Law Symposium (CCH 1957) 124, 137-139; Feldman and Zorn, *Advertising and Promotional Allowances* (Bureau of National Affairs, 1948) 143-46. If petitioners' practices violate Section 2(f), they also violate Section 5 of the Federal Trade Commission Act. *Times-Picayune* v. *United States*, 345 U.S. 594, 609. But whether or not Section 2(f), as written, includes within its ban the inducement and receipt of payments violating Section 2(d), the omission, according to the draftsman of that Section, was inadvertent. Dunn, *op. cit. supra*, at 61.

[11] Petitioners' argument (Pet. 12-13) against the application of Section 5 to their practices because of the difficulties buyers may have in finding out whether proportionally equal allowances have been made by their supplier to competitors, is inappropriate. For the Commission charged petitioners with knowledge (R. 5a) and

letter, of the Clayton Act is subverted. And that is enough to justify remedial action by the Commission under the broad mandate of the Federal Trade Commission Act.

2. Petitioners' claim (Pet. 15-16) that, because the inducement and receipt of preferential allowances was their defensive response to illegal price-fixing by the publishers, these practices cannot violate Section 5, is wholly without merit. The court of appeals correctly applied the settled principle that "resort to practices outlawed by the antitrust laws cannot be justified by the fact that the practices were a defense to illegal activity" (Pet. App. 29). *Fashion Guild* v. *Federal Trade Commission*, 312 U.S. 457, 468; *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211, 214.

3. The court of appeals (Pet. App. 26-28) upheld the Commission's ruling (R. 45a-47a) that, despite the absence of privity of contract between the publishers and petitioners, the latter were nevertheless "customers" of the publishers within the meaning of Section 2(d) of the Clayton Act, because the publishers dealt directly with the petitioners and controlled the terms upon which petitioners bought. Petitioners contend (Pet. 16) that this "indirect customer" doctrine should not be applied here because the publishers' control of the terms resulted from illegal price fixing. But that is beside the point. The rationale of the "indirect customer" doctrine, as the court of appeals correctly noted, is "to effectuate the purpose of giving protection to

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assumed it to be a necessary ingredient of the offense (R. 50a, 56a). So did the court of appeals (Pet. App. 24-25, 28-29, 57). See also *Giant Food, Inc.* v. *Federal Trade Commission*, *supra*, p. 7.

buyers' competitors * * * from the evil effects of direct or indirect price discrimination" (Pet. App. 27, 28).

4. Petitioners also assert (Pet. 17) that there is no substantial evidence to support the Commission's findings that they knew, or should have known, of the preferential treatment they were receiving. That is a question, however, "which Congress has placed in the keeping of the Courts of Appeals." *Federal Trade Commission* v. *Standard Oil Co.*, 355 U.S. 396, 401. The court below found ample evidence to support the findings (Pet. App. 29).

5. Petitioners contend (Pet. 17-18) that, since the interstate shipments of magazines are broken up and repacked by the wholesaler before being shipped to them, their dealings are purely local, intrastate transactions, outside the jurisdiction of the Commission. But this contention, as the court of appeals declared, "is irrelevant" (Pet App. 24). Jurisdiction is not asserted over the parties or the sale of magazines *per se*, but "over the questioned practices, namely, the use of the bargaining power of an interstate chain of newsstands to secure promotional rebates from giant interstate publishing firms selling magazines nationally through this chain" (*ibid.*). These practices clearly occurred "in commerce" within the meaning of Section 5 of the Federal Trade Commission Act.[12]

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[12] Petitioners' attack on the order (Pet. 18), which the court of appeals limited to "the specific practices involved in these proceedings" (Pet. App. 30), merely reapulates their argument (Pet. 12-13) against any application of Section 5 to their practices because of the difficulties of determining the existence *vel non* of propor-

CONCLUSION

While the question presented is important in the administration of the Federal Trade Commission Act, there is no conflict of decisions or other compelling reason for review by this Court. The petition for certiorari should be denied.

Respectfully submitted.

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tionality. But, as noted above, p. 10, n. 11, petitioners are not required to act at their peril; they need only make reasonable inquiry, if warranted by information in their possession.

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